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#### BEFORE THE

## **Federal Communications Commission**

WASHINGTON, D.C.

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In re	)	DA 04-1536	98-204
	)	Released: May 28, 2004	
EEO Audits of Broadcast Stations	)	-	RECEIVED

To: Ms. Marlene H. Dortch, Secretary, Office of the Secretary Attention: Lewis Pulley, Assistant Chief, Policy Division, Media Bureau JUN 2 1 2004

Federal Communications Commission Office of the Secretary

# EMERGENCY REQUEST FOR RELIEF UNDER BROADCAST EEO AUDITS

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters
Association, Arkansas Broadcasters Association, California Broadcasters Association, Connecticut
Broadcasters Association, Florida Association of Broadcasters, Georgia Association of
Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana
Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters,
Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware
Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of
Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters,
Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters
Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New
Jersey Broadcasters Association, New Mexico Broadcasters Association, New York Broadcasters
Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters,
Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters
Association of Puerto Rico, South Carolina Broadcasters Association, South Dakota Broadcasters
Association, Tennessee Association of Broadcasters, Utah

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Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys, hereby request the Commission (i) to withdraw all EEO Audit Letters mailed to radio and television stations on or about May 28, 2004, as well as to delay mailing any additional EEO Audit Letters to stations, until at least ninety (90) days after the Commission releases an order acting on the several pending Petitions for Reconsideration of the EEO Regulations (the "Petitions"), or, in the alternative, (ii) to extend the deadline for responding to the May 28 EEO Audit Letters, as well as to any additional EEO Audit Letters, until at least ninety (90) days after the Commission releases an order acting on the Petitions. This ninety (90) day period will afford stations nationwide a meaningful opportunity to incorporate the substance of the reconsideration decision into their EEOrelated programs and efforts before the EEO Audits are reinstituted. It is respectfully requested that the Commission take prompt action on this request since the current deadline for filing responses to the May 28 EEO Audit Letters is June 28. Of course, a grant of this request is without prejudice to any EEO-related action which the Commission may take in the future after its order on reconsideration.

On behalf of their member stations, the State Associations hereby continue their active involvement in Commission proceedings and actions involving the FCC's EEO regulations. The State Associations do not object in principle to Commission audits generally. However, the State Associations do object to the current EEO audit which is (i) inconsistent with the scope of the EEO audit program authorized by the full Commission, (ii) inexplicably, unreasonably, and prejudicially premature, and, in any event (iii) improperly fails to treat the matter confidentially.

### EEO Audits Are Outside Scope of Commission Authorized EEO Audits

In its Report and Order adopting the current EEO Regulations, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, 17 FCC Rcd 24018, at 155 (2002), the Commission stated that it intended to conduct an EEO audit of approximately 5% of the radio and television broadcast stations each year. Chairman Powell, in his letter dated May 10, 2004 to the United Church of Christ Inc. stated that 550 radio stations and 70 television stations would therefore be audited this year. However, the Media Bureau's iteration of that EEO audit program is structured in a way so that the number of stations to be audited will substantially exceed the 5% limitation. The reason is that while each EEO Audit Letter is mailed to an individual radio and television station, the Bureau requests that the response come from the station employment unit ("SEU") with which the station is associated. As a result, the EEO audit program will include all stations within the particular SEU, thereby vastly exceeding the 5% limitation. Accordingly, the Media Bureau should withdraw the EEO Audit Letters so that the EEO audit program can be restructured so that it falls within the 5% parameters set out by the full Commission in its Report and Order.

In another respect, the EEO Audit Letters are beyond the scope of the EEO Audits as authorized by the full Commission. The full Commission expressly contemplated (para. 155) that the EEO Audits initially would only request documents in the station's public inspection file. However, the EEO Audit Letter goes well beyond that contemplation, with the Bureau requiring stations to provide it with voluminous information not required to be placed in the public file, such as copies of all advertisements, bulletins, letters, faxes, emails, or other communications announcing a full-time position (Question 3.(b)); documentation demonstrating performance of

recruitment initiatives (Question 3.(c)); etc. Once again, the EEO Audit Letters should be withdrawn.

### EEO Audits Prejudge Reconsideration Proceeding and Prejudice Stations

Not only is the current EEO Audit program inconsistent with the scope of the program authorized by the full Commission, the Bureau's act of initiating the program at this time both prejudges the petition for reconsideration proceeding pending before the Commission and unfairly prejudices stations providing responses by the June 28 deadline. As the Commission is well aware, several Petitions for Reconsideration of the Commission's EEO regulations have been filed by a number of parties, including the State Associations. Those petitions have been pending before the Commission for over a year. In the aggregate, the Petitions, particularly those filed by the State Associations, raise a significant number of important issues and questions that need to be addressed in order to clarify and guide each station as it tries to fully comply with what the Commission intended under its EEO regulations. As demonstrated by the Petitions, the EEO regulations contain many errors and ambiguities. Given these circumstances, it would be unreasonable, and indeed unlawful, for the Commission to take any adverse action against a station under the EEO regulations. As a result, it would appear to be a waste of the Commission's resources to try, at this time, to assess a station's full compliance with the EEO regulations prior to Commission action on reconsideration and before stations have had a meaningful opportunity to incorporate the substance of that decision into their respective EEO-related programs and efforts.

As shown below, the EEO Audit Letter itself well demonstrates the legal and practical problems created by attempting to conduct an EEO audit before the Commission has acted on the pending petitions for reconsideration:

Example #1: While each EEO Audit Letter was sent to an individual radio or television station, the Commission intends that the station's response be from the perspective of the SEU of which that station is a part. See Questions 2 and 3. Thus, the response will turn on the definition of what an SEU is. On reconsideration, the State Associations have raised the question of whether an SEU includes stations that are "commonly controlled" in addition to those that are "commonly owned." The EEO Audit Letter not only appears to prejudge this issue, it also unreasonably disregards the fact that the FCC's resolution of this issue will affect what stations are to be included in a particular SEU.

Example #2: A station's response to an EEO Audit Letter will be affected by the number of "permanent" employees within the SEU. See Questions 2 and 3. On reconsideration, the State Associations have asked the Commission to clarify the definition of a "temporary employee," as distinguished from a "permanent" employee; reconsider treatment of "owner-employees;" and, adjust the definition of an "exempt" SEU. Apart from the appearance of prejudgment here, the Bureau does not take into consideration that resolution of these issues will affect what other questions in the EEO Audit Letter will need to be addressed by a particular SEU.

Example #3: The respondent is required to provide copies of the two most recent Annual EEO Public File Reports. See Question 3(a). On reconsideration, the State Associations have sought reconsideration of the recordkeeping and reporting requirements relating to these reports. Accordingly, the EEO Audit Letter appears to have improperly prejudged later Commission consideration of these issues.

Example #4: The station must provide documentation of its recruitment efforts for each full-time position filled during certain periods. See Question 3(b). However, full recruitment is not required under certain circumstances, as in the case of "exigent circumstances." Moreover, a

determination of what constitutes adequate recruitment is far from clear. On reconsideration, the State Associations have asked the Commission to define "exigent circumstances" in a commercially reasonable way. The State Associations have also asked the Commission to clarify when an organization should be deemed to be an "Eligible Referral Organization," and whether an SEU must use print and other media when it recruits. Depending upon the FCC's resolution of these issues, a station's decision not to recruit for a particular opening, or to recruit without using print or other media, may or may not be considered reasonable.

Example #5: The respondent must provide documentation of its supplemental recruitment initiatives. See Question 3(c). This review will likely involve a Commission determination of whether an SEU has performed an adequate number of menu option supplemental recruitment initiatives during each two year segment of the station's license term. On reconsideration, the State Associations have raised numerous issues/questions regarding mixing and matching credits; the availability of job fair credits where group owners send their headquarter HR personnel; the amount of credit for "co-hosting" a job fair; the amount of participation by women and minorities in an organization necessary to receive a co-sponsorship credit; clarification of the eligibility for credit of State Association established internship programs; the eligibility of the career page websites of the State Associations, National Alliance of State Broadcasters Associations, and National Association of Broadcasters for menu option credits; what constitutes "participation" in a scholarship program that has been established by a State Association; and, whether mentoring programs that are not limited to station personnel are eligible for credit; etc. With respect to State Association scholarship programs, the delay in the FCC resolving on reconsideration a number of scholarship-related issues works at cross-purposes with the Commission's goal of expanding those important programs. At this point, many State Associations do not feel comfortable in asserting that supplemental

recruitment credits are available for participation in these scholarship programs, thereby postponing an added regulatory incentive which would dramatically expand the effectiveness of those programs. In any event, depending upon how the Commission resolves these issues on reconsideration, a responding SEU may or may not fully comply with the EEO regulations.

Example #6: The respondent is required to describe the station employment unit's efforts to analyze its EEO program "to insure that it is effective and address any problems." See Question 3(f). On reconsideration, the State Associations asked the Commission to clarify what it meant when it asked stations in FCC Form 396 to explain any "difficulties" the SEU may have experienced in its outreach efforts. Similarly, in the EEO Audit Letter context, are the words "effective" and "problems" intended to elicit whether the respondent has experienced "problems" in attracting enough applicants overall? Or from specific referral sources? Or enough applicants based on race, ethnicity or gender? In short, given the current record before the Commission, no station is able to answer the question with reasonable certainty as to what the Commission intended. Given this uncertainty, the question raises very serious Equal Protection concerns that must be addressed before the EEO Audit has begun.

Example #7: The question for religious broadcasters is unclear in terms of what the Commission wants the broadcaster to provide. See Question 3(h). On reconsideration, the State Associations have asked the Commission to correct a number of important drafting errors relating to religious broadcasters, as well as to eliminate any requirement that such broadcasters report the referral sources of their interviewees and hirees since such disclosure will chill a religious broadcaster's exercise of its freedom to employ co-religionists and will also entangle the government in religion. To the extent that the EEO Audit Letter contemplates that such information

be disclosed, again this would appear to prejudge the issue and raises immediate irreparable injury concerns of constitutional dimensions for religious broadcasters.

What these examples so vividly demonstrate are:

- (1) The highest priority of the Commission should be to quickly remove the appearance that the proceeding on reconsideration has been compromised, namely that the Commission has prejudged the outcome of its expected action on reconsideration. The first step to fully restore confidence in that reconsideration process is for the Commission either to promptly withdraw the EEO Audit Letters or to promptly announce publicly that it has extended the deadline for filing responses to EEO Audit Letters until ninety (90) days after the Commission releases an order resolving the pending Petitions for Reconsideration.
- (2) The EEO Audit is assumed to be a serious effort on the part of the Bureau. However, it would be unreasonable, and indeed unlawful, for the Bureau to assess adversely a station's compliance with the EEO regulations when there are so many serious issues and questions that have been pending before the Commission for such a long period of time. The delay in acting on reconsideration belies any urgency in initiating and concluding a meaningful EEO audit.

  Accordingly, the Commission should do it right the first time by acting on reconsideration, giving stations a meaningful opportunity to take any new decision into account, and then begin an EEO audit program a reasonable period of time thereafter.
- (3) If the Commission were to attempt to stay the course and continue with the EEO Audit, not only could it not reasonably and lawfully sanction any station under the EEO regulations, it would still have to provide a reasonable opportunity for stations, after the release of an order on reconsideration, to supplement their earlier responses, thereby further delaying any final action under the EEO audit. If some type of adverse action were taken against stations by the Bureau

under the EEO audit, surely there would be petitions for reconsideration of those actions, based both on the issues presented herein, as well as on what the Commission did nor did not do on reconsideration. It would be no defense for the Commission to tell an SEU that it is free to explain in its response what its understanding is of particular aspects of the Commission's EEO regulations. While stations should have the right to have their good faith interpretations taken into account, responses based on such a pre-reconsideration moving target, as here, make audit oversight by the Commission even less meaningful at this juncture. In short, no time is gained by proceeding now, and the necessary post-reconsideration supplemental filings will only cause delay at the back end and further exacerbate the paperwork burden on the Commission's EEO staff as well as on the staff of the respondent SEUs. In short, proceeding with an EEO audit at this time will unnecessarily create an administrative and legal nightmare for all concerned.

The Commission should not lose sight of the fact that any delay in reinstitution of the EEO Audit program or in the filing of responses to the EEO Audit Letter that may be caused by the grant of this request, remains wholly within the control of the Commission. The sooner the Commission resolves the petitions for reconsideration and provides stations with a meaningful opportunity to take any new decision into account, the more quickly the EEO Audit program can be conducted in a way that is meaningful for the Commission as well as participating stations.

### EEO Audits Should Be Confidential

For all practical purposes, a station receiving the EEO Audit Letter is under a serious, targeted investigation by the FCC. To underscore this point, the Bureau requires that any response be sworn to by an officer of the licensee. The station is expressly warned that any misrepresentation or lack of candor in a response will make the licensee subject to fines, imprisonment and other very serious adverse action. In an investigative setting, the Commission

usual and customary practice is to maintain the confidentiality of the fact of the investigation and of the responses by the licensee. The Bureau has not provided any justification for not treating EEO Audits in the same confidential manner. The Report and Order does not state that these audits will be made public. Furthermore, in the FCC Form 395-B context, the full Commission recently decided that the issue of confidentiality is so important that it has delaying any requirement for the filing of EEO employment data. Accordingly, the EEO Audits should be suspended until the Commission resolves this important issue as relates to the EEO Audits.

Respectfully submitted,

Bv.

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